67 FLRA No. 58

UNITED STATES
DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS
FEDERAL PRISONS CAMP
BRYAN, TEXAS
(Agency)

and

AMERICAN FEDERATION
OF GOVERNMENT EMPLOYEES
COUNCIL OF PRISON LOCALS
LOCAL 3978
(Union)

0-AR-4872

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DECISION

February 6, 2014

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Before the Authority: Carol Waller Pope, Chairman, and Ernest DuBester and Patrick Pizzella, Members

I. Statement of the Case

As relevant here, Arbitrator Don B. Hays found that officers who conduct an inmate count were entitled to fifteen minutes of overtime compensation per shift and that officers who do not perform the inmate count, but receive their equipment at either the control center or a duty post (equipment exchange), were entitled to five minutes of overtime compensation per shift. The Authority must decide two questions.

The first question is whether the Arbitrator's determination that officers are entitled to overtime compensation for participating in the inmate count is contrary to the Fair Labor Standards Act (FLSA).[1] Because the Arbitrator's factual findings support his legal conclusion, we find that the award is not contrary to law.

The second question is whether the Arbitrator's conclusion that officers are entitled to five minutes of overtime compensation per shift for engaging in pre-shift equipment exchanges conflicts with the requirement in 5 C.F.R. § 551.412(a)(1) that a "preparatory . . . activity" must be performed for more than ten minutes per workday in order to be compensable. Because we find that the pre-shift equipment exchanges are preparatory activities, the Arbitrator's award granting officers five minutes of overtime compensation per shift for these activities conflicts with § 551.412(a)(1), and we set aside that portion of the award.

II. Background and Arbitrator's Award

The Agency, a minimum-security prison, consists of various departments. There are three shifts – morning watch, day watch, and evening watch – for officers who work in the Agency's correctional-services department. Although the starting and ending times of certain shifts overlap, the morning-watch and evening-watch shifts do not, because the morning-watch shift starts at, and the evening-watch shift ends at, 12:00 a.m.

The Union filed a grievance alleging that the Agency violated the parties' agreement and the FLSA by "suffering or permitting" officers to work both before and after their assigned shifts without proper compensation.[2] The grievance was unresolved and was submitted to arbitration.

As relevant here, the Arbitrator concluded that the Agency suffered or permitted evening-watch and morning-watch officers to conduct the 12:00 a.m. inmate count outside their normal work hours and that those officers were entitled to fifteen minutes of overtime compensation per shift. Specifically, the Arbitrator found that morning-watch officers arrive prior to the start of their shifts to assist evening-watch officers with the 12:00 a.m. inmate count and that, after the count, evening-watch and morning-watch officers jointly verify the count and perform other associated duties before the evening-watch officers are relieved from duty.

In addition, the Arbitrator found that the Agency suffered or permitted other officers to engage in equipment exchanges before their shifts began. Such officers are required to arrive "a maximum of five minutes"[3] early "to procure . . . equipment and begin other essential duties" so that the outgoing officers can depart on time at the end of their shifts.[4] In determining whether the time officers spent conducting the equipment exchange was compensable, the Arbitrator noted that pre-shift and post-shift activities may be compensable if they are "an integral part of, and indispensable to the

[1] 29 U.S.C. §§ 201-219.

[2] Initial Award at 1-2 (emphasis omitted); *see also* 29 U.S.C. § 203 (as used in FLSA, term "'[e]mploy' includes to suffer or permit to work").

[3] Initial Award at 46 (emphasis omitted).

[4] *Id.* at 45.

employee's principal activities."[5] Next, the Arbitrator emphasized how essential the equipment exchange was for officers working in the prison environment, and concluded that it was not a "preparatory or concluding activit[y], as those terms are defined by 5 C.F.R. § 551.412(a)," but, rather, a "principal activit[y]."[6] Consequently, the Arbitrator awarded the officers five minutes of overtime compensation for each equipment exchange on each shift.

The Agency filed exceptions to the Arbitrator's award, and the Union filed an opposition to the Agency's exceptions.

III. Analysis and Conclusions

The Agency argues that the award is contrary to law and regulation. When an exception involves an award's consistency with law, the Authority reviews any questions of law raised by the exception and the award de novo.[7] In applying the standard of de novo review, the Authority determines whether an arbitrator's legal conclusions are consistent with the applicable standard of law.[8] In making that determination, the Authority defers to the arbitrator's underlying factual findings unless the appealing party establishes that those findings are deficient as nonfacts.[9]

A. The award of fifteen minutes of overtime compensation to evening-watch officers who conduct the inmate count is not contrary to the FLSA.

The Agency claims that the award of fifteen minutes of compensation to officers who conduct the inmate count at the end of the evening-watch shift is contrary to the FLSA. The Agency argues that only morning-watch officers perform the inmate count, and that the evening-watch officers leave at 12:00 a.m., the end of their shift.

In reviewing an arbitrator's legal conclusions de novo, the Authority consistently has denied exceptions when the arbitrator has applied the correct standard of law and made findings of fact that support the disputed legal conclusion.[10] Here, the Arbitrator found that evening-watch and morning-watch officers jointly conduct the inmate count that occurs at 12:00 a.m. The Arbitrator also determined that evening-watch officers must stay beyond the end of their shift to verify the count and to perform "other associated duties."[11] As the Agency does not contest these factual findings as nonfacts, the Authority defers to them.[12] Moreover, the Agency does not argue that the amount of overtime compensation awarded to evening-watch officers is erroneous. Thus, the Arbitrator's factual findings support his legal conclusion that the evening-watch officers who perform the inmate count are entitled to fifteen minutes of overtime compensation per shift. Accordingly, we find that the Agency has failed to demonstrate that the award is contrary to the FLSA, and we deny the Agency's exception.

B. The award of five minutes of overtime compensation to officers who engage in an equipment exchange is contrary to 5 C.F.R. § 551.412(a)(1).

The Agency argues that awarding five minutes of overtime compensation per shift for equipment exchanges violates 5 C.F.R. § 551.412(a)(1). Section 551.412(a)(1) provides that, if a "preparatory or concluding activity is closely related to," and is "indispensable to the performance of," an employee's principal activities, *and* "the total time spent in that activity is *more than [ten] minutes* per workday, the agency shall credit all of the time spent in that activity, including the [ten] minutes, as hours of work."[13] Because the Arbitrator found that officers spent less than ten minutes exchanging equipment per workday, the Agency argues that awarding them overtime compensation is contrary to § 551.412(a)(1).

The Union contends that § 551.412(a)(1) – which concerns "preparatory or concluding" activities – does not apply because the Arbitrator properly found that the equipment exchange constitutes a principal activity. Further, the Union asserts that, even if the regulation applies, the Agency has failed to demonstrate that officers' equipment-exchange duties are so insubstantial that they are not compensable (the de minimis doctrine).[14]

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[5] *Id.* at 39, 40 n.53 (citing *Steiner v. Mitchell*, 350 U.S. 247 (1956); *Amos v. United States*, 13 Ct. Cl. 442 (1987)).

[6] *Id.* at 40 (emphasis omitted). See *infra* section III.B. for the pertinent text of 5 C.F.R. § 551.412.

[7] *E.g., U.S. DOJ, Fed. BOP, U.S. Penitentiary, Marion, Ill.*, 61 FLRA 765, 770 (2006) (*BOP, Marion*).

[8] *E.g., id.*

[9] *E.g., U.S. DOJ, U.S. Marshals Serv., Justice Prisoner & Alien Transp. Sys.*, 67 FLRA 19, 22 (2012).

[10] *AFGE, AFL-CIO, Local 3614*, 61 FLRA 719, 723 (2006); *see also BOP, Marion*, 61 FLRA at 772-73.

[11] Initial Award at 44.

[12] *See, e.g., U.S. DOJ, Fed. BOP, U.S. Penitentiary, Atwater, Cal.*, 66 FLRA 737, 740 (2012).

[13] 5 C.F.R. § 551.412(a)(1) (emphasis added).

[14] Opp'n at 20-22 (citing *Lindow v. United States*, 738 F.2d 1057 (9th Cir. 1984)).

As previously discussed, the Arbitrator determined that the equipment exchange is a principal activity, not a preparatory or concluding activity, as defined by § 551.412(a)(1). Although the Union claims that the Arbitrator's conclusion constitutes a factual finding to which the Authority should defer, the characterization of a duty as a principal activity is a legal conclusion, which the Authority reviews de novo.[15]

Principal activities are the activities that an employee is "employed to perform."[16] By contrast, preparatory activities are activities that are "closely related . . . and . . . indispensable to the performance of the principal activities."[17] Although the Authority has suggested that "activities that are integral and indispensable to an employee's principal . . . activities are themselves principal activities,"[18] we clarify that applicable Office of Personnel Management regulations distinguish principal activities from preparatory activities for federal employees.[19]

Here, the Arbitrator made no finding, and there is no claim, that equipment exchanges are the duties that guards are "employed to perform."[20] Therefore, there is no basis for the Arbitrator's conclusion that the equipment exchanges are the guards' principal activities. To the extent that the Arbitrator found that the equipment exchanges are closely related and indispensable to the performance of the guards' principal duties, that supports a conclusion that the exchanges are preparatory, not principal, activities.[21]

Section 551.412(a) states that a preparatory activity is not compensable unless "the total time spent in that activity is more than [ten] minutes per workday."[22] The Authority also consistently has held that an award entitling employees to overtime compensation for performing preparatory or concluding activities for ten minutes or less per workday is contrary to § 551.412(a)(1).[23] And, although the Union cites court decisions in support of its argument that the Agency has not established a defense to liability based on the de minimis doctrine, those decisions are inapposite because they do not concern the application of § 551.412(a)(1), a government-wide regulation that is generally applicable to federal-government employees and contains the ten-minute requirement.[24] Consequently, because the total time awarded by the Arbitrator for the equipment exchange does not exceed ten minutes per workday, we find that the award is contrary to § 551.412(a)(1). Therefore, we grant the Agency's exception and set aside this portion of the award.

In view of this determination, it is unnecessary to address the Agency's alternative argument that officers are not entitled to compensation for performing the equipment exchange because they do not arrive before the start of their shifts in order to perform this duty.

IV. Decision

We deny the Agency's exception that the award of fifteen minutes of overtime compensation for officers who assist in an inmate count is contrary to law and set aside the portion of the Arbitrator's award granting officers five minutes of overtime compensation for the equipment exchange.

[15] *See U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Allenwood, Pa.*, 65 FLRA 996, 999 (2011) (*FCI, Allenwood*); *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Jesup, Ga.*, 63 FLRA 323, 327-28 (2009) (*FCI, Jesup*).
[16] 5 C.F.R. § 550.112(a).
[17] *Id.* § 551.412(a)(1).
[18] *FCI, Allenwood*, 65 FLRA at 999; *accord FCI, Jesup*, 63 FLRA at 327-28.
[19] 5 C.F.R. § 550.112(b) ("a preparatory activity that an employee performs prior to the commencement of his or her principal activities . . . [is] not [a] principal activit[y]").
[20] *Id.* § 550.112(a).
[21] *Id.* § 551.412(a)(1).
[22] *Id.*
[23] *E.g., U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Sheridan, Or.*, 65 FLRA 157, 159 (2010); *U.S. DOJ, Fed. BOP, Fed. Corr. Inst., Terminal Island, Cal.*, 63 FLRA 620, 624-25 (2009); *U.S. DOJ, Fed. BOP, U.S. Penitentiary, Leavenworth, Kan.*, 59 FLRA 593, 598 (2004) (*BOP, Leavenworth*).
[24] *See BOP, Leavenworth*, 59 FLRA at 598.